

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AKUA N. POWELL,	§
	§
Defendant Below-	§ No. 169, 2012
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 0803026578
Plaintiff Below-	§
Appellee.	§

Submitted: June 7, 2012

Decided: July 31, 2012

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

**ORDER**

This 31<sup>st</sup> day of July 2012, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Akua Powell, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Powell's opening brief that his appeal is without merit. We agree and affirm.

(2) The record in this case reflects that Powell was arrested, along with several codefendants, for the armed robbery of a poker game at the Wild Quail Country Club on February 22, 2008. One of the poker players, a

Delaware State Trooper named Hyun Jin Kim, turned out to be the mastermind behind the robbery. Kim, among other witnesses, testified against Powell at trial. Ultimately, the jury convicted Powell in March 2009 of eleven counts each of Robbery in the First Degree and Possession of a Firearm During the Commission of a Felony, two counts of Offensive Touching, Wearing a Disguise During the Commission of a Felony, and Conspiracy in the Second Degree. The Superior Court sentenced Powell to a total period of 315 years at Level V incarceration to be suspended after serving sixty-six years for probation. This Court affirmed Powell's convictions and sentences on direct appeal.<sup>1</sup> Powell filed his first motion for postconviction relief in October 2010. The Superior Court referred the matter to a Commissioner who issued a report recommending that Powell's motion be denied. The Superior Court adopted the Commissioner's recommendation and denied Powell's motion for postconviction relief on February 29, 2012. This appeal followed.

(3) Powell raises three issues in his opening brief on appeal.<sup>2</sup> First, he contends that he received ineffective assistance of counsel. Second, he contends that he is actually innocent, that none of the physical evidence tied

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<sup>1</sup> *Powell v. State*, 2009 WL 3367068 (Del. Oct. 20, 2009).

<sup>2</sup> To the extent that Powell raised additional issues in the motion he filed in the Superior Court, those issues are deemed waived for his failure to argue them in his opening brief on appeal. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

him to the crime, and that the jury would not have convicted him but for the erroneous admission of irrelevant and highly prejudicial evidence. Finally, Powell contends that the prosecutor engaged in misconduct.

(4) In reviewing the Superior Court’s denial of postconviction relief, this Court first must consider the procedural requirements of Superior Court Criminal Rule 61 before it may consider the merits of any postconviction claims.<sup>3</sup> Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the defendant can establish cause for relief from the procedural default and prejudice from a violation of his rights.<sup>4</sup> Also, Rule 61(i)(4) bars consideration of any claim that was previously adjudicated unless reconsideration is warranted in the interest of justice.<sup>5</sup>

(5) With respect to his ineffective assistance of counsel claim, Powell asserts that counsel “squandered” his direct appeal by filing a “no merit” brief pursuant to Supreme Court Rule 26(c) and by failing to raise any issues for the Court’s review.<sup>6</sup> In order to establish a claim of

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<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> Del. Super. Ct. Crim. R. 61(i)(3) (2012). Pursuant to Rule 61(i)(5), however, a claim that is otherwise barred by Rule 61(i)(3) may be considered if the movant can establish that the Superior Court lacked jurisdiction or can establish a colorable claim of a miscarriage of justice due to a constitutional violation that undermined the integrity of the proceedings leading to the conviction. *See* Del. Super. Ct. Crim. R. 61(i)(5) (2012).

<sup>5</sup> Del. Super. Ct. Crim. R. 61(i)(4) (2012).

<sup>6</sup> In a related claim, Powell contends that his counsel was ineffective for failing to request an extension on direct appeal in order to give Powell more time to respond to counsel’s Rule 26(c) brief. Powell did not raise this argument in the postconviction motion he filed in the Superior Court. Thus, neither counsel nor

ineffective assistance of counsel, a defendant must prove that: (a) counsel's representation fell below an objective standard of reasonableness; and (b) there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.<sup>7</sup> In this case, all of the issues that Powell contends his counsel should have raised on his behalf were, in fact, raised by Powell himself in response to his counsel's brief. This Court reviewed Powell's issues on direct appeal and found no merit to them. Accordingly, Powell can establish neither cause nor prejudice from his counsel's failure to brief these meritless issues for him on direct appeal.

(6) Powell next contends that he is actually innocent and that he would not have been convicted but for the Superior Court's admission of irrelevant and prejudicial evidence.<sup>8</sup> Powell's complaints about the Superior Court's evidentiary rulings, however, were raised and rejected by this Court on direct appeal.<sup>9</sup> Accordingly, we find no basis to reconsider these previously adjudicated claims.<sup>10</sup> Moreover, Powell presented no new

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the Superior Court had an opportunity to address his contention. Accordingly, we will not consider this claim for the first time on appeal pursuant to Supreme Court Rule 8.

<sup>7</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>8</sup> Powell specifically states in his opening brief on appeal that his claim of actual innocence is not a claim of insufficient evidence; thus, this Court does not review his claim as a challenge to the sufficiency of the evidence to sustain his convictions.

<sup>9</sup> *Powell v. State*, 2009 WL 3367068 (Del. Oct. 20, 2009).

<sup>10</sup> Del. Super. Ct. Crim. R. 61(i)(4) (2012).

evidence to establish his innocence. We thus reject his conclusory assertion of innocence.

(7) Powell's final claim alleges prosecutor misconduct. Powell raised prosecutorial misconduct as an argument in his direct appeal.<sup>11</sup> The Court is not required to reexamine this claim simply because it has been refined or restated.<sup>12</sup> Under the circumstances, we do not find reconsideration of this previously adjudicated claim to be warranted in the interest of justice.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>11</sup> *Powell v. State*, 2009 WL 3367068 (Del. Oct. 20, 2009).

<sup>12</sup> *Skinner v. State*, No. 607 A.2d 1170, 1172 (Del. 1992).